

## Death and Taxes - Maryland Style

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### Recommended Citation

H. V. Eney, *Death and Taxes - Maryland Style*, 17 Md. L. Rev. 101 (1957)  
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# Maryland Law Review

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VOLUME XVII

SPRING, 1957

NUMBER 2

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## DEATH AND TAXES — MARYLAND STYLE<sup>†</sup>

By H. VERNON ENEY\*

It is not the purpose of this article, notwithstanding its somewhat misleading title, to present a philosophical discourse on death or on the life hereafter but rather to consider only some of the taxes imposed as a result of death. The author also hastens to disavow an intention to discuss any admissions tax which may be exacted by St. Peter from those knocking on the pearly gates or any excise imposed by Satan for the privilege of residing in the nether regions. Its purpose is simple, to discuss the taxes imposed by the laws of Maryland with respect to property transferred at death and to suggest some revisions in those laws. In so doing it is perhaps unnecessary to remind the reader that taxes like death are inevitable or, to paraphrase Benjamin Franklin, that the only things certain in this world are death and taxes.

As a source of revenue the Maryland death taxes do not bulk large, certainly not large enough to solve any major problems for a Governor presenting a record breaking \$363,000,000 budget to the Legislature. In the fiscal year ended June 30, 1956, the total revenue derived from all four Maryland death taxes, that is, the lineal inheritance tax, the collateral inheritance tax, the tax on commissions of executors and administrators and the Maryland estate tax, produced only \$4,216,843 or 1.67% of the total amount of all taxes. Compare this with the \$41,691,238 (16.55%) produced by the sales tax, and the \$60,788,414 (24.13%) produced by the individual income tax. Perhaps also, even though death comes inevitably to all, the Maryland death taxes do not touch as many of its citizens as do the income and sales taxes. Nearly everyone pays sales taxes and out of a total population of 2,659,000 in 1955 there were 708,842 individual income tax returns filed; but although there were 24,344 deaths in Maryland in the same year there was

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† Paper read before the Round Table on March 8, 1957.

administration on only approximately 4,000 estates in Maryland's twenty-three counties and Baltimore City.

Nevertheless, it is hoped that a discussion of the Maryland death taxes will be of some interest because they affect everyone who has accumulated any property at all and the collateral inheritance tax and the tax on commissions are, with the exception of property taxes, possibly the oldest Maryland state taxes on the statute books today which have been continuously in effect since their adoption.

The first Maryland inheritance tax was adopted in 1844<sup>1</sup> and the same Legislature also adopted the statute imposing the tax on commissions of executors and administrators.<sup>2</sup> Maryland was thus one of the first states to adopt an inheritance tax. The State of Pennsylvania which had adopted such a tax in 1826 was apparently the only state to do so earlier than Maryland.<sup>3</sup>

It will be remembered that at the close of the 1830's Maryland, in common with most other states of the young Republic, was in serious financial difficulties as a result of its very large investments in internal improvement companies. In 1841, a general income tax of 2½% on gross earnings and a progressive tax on the income from ground rents had been imposed,<sup>4</sup> but the general income tax law was largely ignored and the income tax on ground rents was held unconstitutional with the result that it was repealed in 1844.<sup>5</sup> It was perhaps for these reasons that the Legislature turned to the inheritance tax and the tax on commissions of executors and administrators. In any event, both taxes were imposed and unlike the ill-fated general income tax of 2½% which was virtually repealed in 1850,<sup>6</sup> the inheritance tax and the tax on commissions of executors and administrators have remained on the statute books ever since their enactment.

The Act of 1844 imposed a tax of 2½% on all estates passing either by will or under the intestate laws, and on property transferred by deed or gift intended to take effect in possession or enjoyment at or after death, other than to or for the use of father, mother, wife, children, and lineal descendants.<sup>7</sup> The statute provided for the payment of the

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<sup>1</sup> Md. Laws 1844, Ch. 237.

<sup>2</sup> Md. Laws 1844, Ch. 184.

<sup>3</sup> See *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283 (1898) and *State v. Alston*, 94 Tenn. 674, 30 S. W. 750 (1895).

<sup>4</sup> Md. Laws 1841-42, Chs. 325, 329.

<sup>5</sup> Md. Laws 1844, Ch. 251.

<sup>6</sup> Md. Laws 1849, Ch. 294, relieved the collectors and the sureties on their bonds from liability for any of the tax not collected or received by them.

<sup>7</sup> *Supra*, n. 1, Sec. 1.

tax by the executor or administrator to the Register of Wills and contained numerous other administrative provisions.

The tax on property other than money or real estate was to be paid on the appraised value as shown on the inventory filed with the Register and the statute required the executor to file with the levy courts detailed information as to any real estate passing subject to the tax. It was made the duty of the respective levy courts to put a fair valuation on the real estate and at the next annual assessment to impose the inheritance tax on such real estate to be collected and paid for the use of the State in the same manner as other taxes on real estate. The statute exempted from the tax all estates valued at less than \$500 but there were no other exemptions except with respect to property passing to the excepted persons above mentioned.

Notwithstanding the fairly elaborate provisions of this statute, the Legislature amended it the very next year<sup>8</sup> to provide that the executors were to pay the tax not later than 13 months after letters of administration were granted, to impose a penalty of forfeiture of commissions for failure to pay the tax, and to change completely the method of assessing and collecting the tax on real estate. The Orphans' Court was directed to issue a summons for persons entitled to real estate passing subject to the tax within ten months from the date of administration and to require the appearance of such persons within three months thereafter in order to value the real estate. These parties were thereupon directed to pay the tax on such value to the Register of Wills and if the tax was not paid within three months of evaluation, the amount of the tax was doubled and it was made a lien on the real estate until paid.<sup>9</sup> In the following year,<sup>10</sup> the statute was again amended to authorize the Orphans' Court to determine what proportion of the tax should be paid by the life tenant and what proportion by the remainderman in cases where a life estate was devised to one person and a remainder to another. Each party was required to pay his proportionate share of the tax within the same time even though his interest had not yet vested in possession.

Again the following year the Legislature found it necessary to make elaborate amendments.<sup>11</sup> Most of these amendments dealt with the tax on real estate, provided for

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<sup>8</sup> Md. Laws 1845, Ch. 202.

<sup>9</sup> *Ibid.*, Secs. 2, 3 and 4.

<sup>10</sup> Md. Laws 1846, Ch. 344.

<sup>11</sup> Md. Laws 1847, Ch. 222.

the appointment of appraisers and substitute appraisers in the same manner as for personal property, imposed on the executor the duty of collecting the tax from the devisees, and empowered the Orphans' Court to authorize the executor to sell the real estate if necessary to collect the tax. There were also provisions authorizing the Registers to act in cases where no administration had been taken out within 90 days after death and empowering the Orphans' Court to revoke letters for failure to file inventories or administration accounts.

This was the statute which was codified in the Code of 1860,<sup>12</sup> and although there have been some very important changes in fairly recent years the law on the statute books today is basically the same as that contained in the Code of 1860.

The very first case to arise under the statute was one filled with human interest although apparently not so regarded by the Court of Appeals of that day.<sup>13</sup> One Nicholas Worthington of John died in 1847, and by his will manumitted all his Negro slaves. It does not appear how many slaves were involved but they were appraised for a total of \$15,433 in the inventory filed in the estate. The State contended that it was entitled to the inheritance tax of 2½% on the appraised value of the Negroes but the executor denied that the gift of freedom to a Negro slave was such a legacy as was liable to the inheritance tax imposed by the Act of 1844.

The Court of Appeals in 1848 did not in its opinion consider the question of humanity thus presented. It did not deliver any philosophical dissertation on the value of freedom or concern itself with any problems of human rights or of the dignity of man. Instead, the court speaking through Judge Spence pointed out that it had only been since 1796 that the owners of slaves had been given the power to give freedom to their slaves by last will and testament, that both by the letter and the policy of the law slaves were property and subject to the same rules of law as other personal property, and that it could not be denied that if a testator by his will bequeathed a slave to another person, the slave was a legacy. The problem was therefore so simple that it needed no citation of authority and the court gave none. It said merely that the bequest of freedom to a slave "confers on such slave the identical rights, interests and benefits, which would pass" if the same slave

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<sup>12</sup> Md. Code (1860), Art. 81, Secs. 124-148, inclusive.

<sup>13</sup> *The State v. Dorsey*, 6 Gill 388 (Md., 1848).

had been bequeathed to another and that the conclusion that the bequest of freedom to a slave is a legacy and hence subject to the tax "is as clear as that things which are equal to the same thing are equal to one another".<sup>14</sup>

It does not appear from the decision in this case just how much tax each individual freed Negro slave had to pay but presumably the slaves were appraised at somewhere near the value at which they were assessed in that period. The General Assessment Act of 1852<sup>15</sup> directed that Negro slaves were to be assessed as follows:

	<i>Male</i>	<i>Female</i>
Under 12 .....	\$ 75.00	\$ 50.00
12 to 21.....	250.00	200.00
21 to 45.....	400.00	300.00
45 to 60.....	160.00	100.00

It would thus appear that the average adult male slave had a value of somewhere near \$400 and he would therefore have to pay a tax of \$10.00 for his freedom.

In the Code of 1860 a provision appears that the inheritance tax law is "not to apply to Negroes manumitted by deed or will".<sup>16</sup> The author has been unable to find any statute between 1847 and 1860 making this change. It is unlikely that it was made by the Legislature of 1860 because the Legislature at that same session passed a statute forbidding the manumission of slaves by deed or by will,<sup>17</sup> but whether this provision was inserted by some earlier Legislature or by the codifiers is immaterial because it became law by the adoption of the Code of 1860 and thereafter freed slaves did not have to pay an inheritance tax for their freedom. This special provision in the statute was repealed in 1874,<sup>18</sup> presumably because there were no longer any slaves.

The inheritance tax statute had been in force for twenty years before its constitutionality was questioned and in a short opinion the Court of Appeals held that the statute was not invalid as being in conflict with Article 15 of the Declaration of Rights.<sup>19</sup> The Court observed that more than one-half million dollars had theretofore been collected from the tax without its constitutionality being questioned.

<sup>14</sup> *Ibid.*, 390-391.

<sup>15</sup> Md. Laws 1852, Ch. 337, Sec. 9.

<sup>16</sup> *Supra*, n. 12, Sec. 124.

<sup>17</sup> Md. Laws 1860, Ch. 322.

<sup>18</sup> Md. Laws 1874, Ch. 483.

<sup>19</sup> *Tyson v. State*, 28 Md. 577 (1868).

The constitutional question was again considered by the Court of Appeals in 1889<sup>20</sup> and in a much lengthier opinion by Judge McSherry the Court upheld the constitutionality of the statute on the ground that since the State has the authority to regulate by law the devolution and distribution of an intestate's property and to prescribe by whom and the manner by which property could pass by will, it necessarily had the power to impose an inheritance tax. The Court said:

"This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated, to be transmitted by will or by descent or distribution."<sup>21</sup>

This has been the basis upon which the constitutionality of such statutes has been upheld in practically every jurisdiction.

It will be noted that in the original act there were only two classes of exemptions, that is, of all property passing to "father, mother, wife, children and lineal descendants" and of all estates having a total value of less than \$500. It was not until 1880<sup>22</sup> that husbands were included in the exempt class and the exemption of estates of less than \$500 remained in the law until 1936.<sup>23</sup> In 1933,<sup>24</sup> however, the law had been amended to exempt moneys not in excess of \$500 bequeathed for the perpetual upkeep of graves. In 1936, the \$500 estate exemption was repealed and an exemption of each "legacy" not in excess of \$100 was added.<sup>25</sup> This exemption was increased to \$150 and extended to cover property passing by intestacy as well as legacies in 1941.<sup>26</sup>

There was no charitable exemption whatsoever in the law originally<sup>27</sup> and even legacies to the counties and municipalities of the State were subject to the tax. This was changed in 1924 with the addition of the proviso that the tax would not apply to any property passing to the City of Baltimore or to any county or city of the State.<sup>28</sup>

<sup>20</sup> *State v. Dalrymple and Lemmon, Adm'rs.*, 70 Md. 294, 17 A. 82 (1889).

<sup>21</sup> *Ibid.*, 299.

<sup>22</sup> Md. Laws 1880, Ch. 444.

<sup>23</sup> Md. Laws 1936, Sp. Sess., Ch. 124, Sec. 105A.

<sup>24</sup> Md. Laws 1933, Ch. 323.

<sup>25</sup> *Supra*, n. 23.

<sup>26</sup> Md. Laws 1941, Ch. 790.

<sup>27</sup> By special act a "Home" was exempted from the tax on a specific bequest. Md. Laws 1890, Ch. 249.

<sup>28</sup> Md. Laws 1924, Ch. 413.

This was further broadened in 1943 to include the present exemption of property passing to charitable organizations, a substantial part or all of the activities of which are carried on in the State of Maryland.<sup>29</sup> In 1955, gifts to similar organizations operating in the District of Columbia were also exempted.<sup>30</sup>

The tax remained at 2½% from 1844 to 1864; from 1864 to 1874 it was 1½%;<sup>31</sup> from 1874 to 1908 it was 2½%;<sup>32</sup> and from 1908 to 1935 it was 5%.<sup>33</sup> In 1935,<sup>34</sup> a tax of 1% was imposed on transfers to the theretofore exempt class, that is, father, mother, husband, wife, children and lineal descendants, and a tax of 7½% was imposed on all others. These are the rates in effect today.

Although there have been no additions to the lineal class since husbands were added in 1880,<sup>35</sup> the exemption for property passing to surviving husbands and wives has been broadened several times since the lineal inheritance tax was first imposed in 1935. Under that Act,<sup>36</sup> all property passing to a husband or wife was subjected to the tax of 1% but the Attorney General had ruled that the proceeds of life insurance passing to a husband or wife or any named beneficiary other than the decedent's estate was wholly exempt,<sup>37</sup> and had previously very promptly ruled that property owned by husband and wife as tenants by the entireties was not subject to the tax.<sup>38</sup> In 1937, the building association lobby persuaded the Legislature to exempt any interest of a surviving spouse in any free share account in any building association or in any moneys on deposit in the names of husband and wife passing to the surviving spouse.<sup>39</sup> In 1945, the interest of the surviving spouse in any registered bond of the United States was exempted from the tax<sup>40</sup> and finally in 1951, the interest of the surviving spouse "in any property of any nature owned by husband and wife either as joint tenants or as tenants by the entireties passing to such surviving spouse" was exempted.<sup>41</sup>

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<sup>29</sup> Md. Laws 1943, Ch. 964.

<sup>30</sup> Md. Laws 1955, Ch. 722.

<sup>31</sup> Md. Laws 1864, Ch. 200.

<sup>32</sup> Md. Laws 1874, Ch. 483, Sec. 113.

<sup>33</sup> Md. Laws 1908, Ch. 695 (p. 238).

<sup>34</sup> Md. Laws 1935, Ch. 90, Sec. 104A.

<sup>35</sup> Md. Laws 1880, Ch. 444.

<sup>36</sup> *Supra*, n. 34.

<sup>37</sup> 21 Ops. Atty. Gen. 701 (1936).

<sup>38</sup> 20 Ops. Atty. Gen. 811 (1935).

<sup>39</sup> Md. Laws 1937, Ch. 189.

<sup>40</sup> Md. Laws 1945, Ch. 742.

<sup>41</sup> Md. Laws 1951, Ch. 620, Sec. 111.



From 1927 to 1935,<sup>42</sup> the tax did not apply to the income of an estate or to any increase in the value of the estate subsequent to the date of death. Since 1935, however, the tax has been imposed both on the income of the estate and on the increase in the value of the estate between date of death and date of distribution. As a corollary the income subjected to the inheritance tax is exempted from the income tax.<sup>43</sup> Although the full increase in value of the estate during administration is subjected to the tax under the statute, this is only theoretically true, first, because the statute since 1936 has specifically forbidden a reappraisal after 13 months (raised to 15 months in 1951)<sup>44</sup> from the date of administration, and second, because the Register normally has no way of knowing whether the estate has increased in value during administration. Ordinarily the executor does not file a petition asking for a reappraisal when the assets of the estate have increased in value. Instead he makes distribution of the assets in accordance with the values shown in the inventory. This sometimes poses problems for careful executors. In cases where distribution is made in kind among a group of persons the executor must in his administration account make the distribution in such a way that on the basis of inventory values the estate is distributed pursuant to the will, and at the same time he endeavors to make the distribution fair on the basis of values existing at the time of distribution. It not infrequently happens that an executor will make distribution in his account on the basis of inventory valuations and append to the account a statement showing the distribution on the basis of values existing at the time the account is filed. So far as the author is aware, the Registers have never attempted to collect an additional tax even when this addendum to the administration account shows on its face that there has been a substantial increase in value during administration.

Aside from life insurance the only exemption applying to all property is the specific exemption of each legacy or distribution of \$150 or less. On the other hand, the exemption of property held by husband and wife as joint tenants or as tenants by the entirety is unlimited as to amount.

With respect to the collateral inheritance tax there are only two exemptions, that is, gifts of \$500 or less for the perpetual upkeep of graves, and gifts to charitable organi-

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<sup>42</sup> Md. Laws 1927, Ch. 43; Md. Laws 1935, Ch. 520.

<sup>43</sup> Md. Code (1951), Art. 81, Sec. 276(i).

<sup>44</sup> Md. Laws 1936, Sp. Sess., Ch. 124, Sec. 108; Md. Laws 1951, Ch. 620, Sec. 119.

zations. With these exceptions the collateral inheritance tax is applicable to all property passing either by will or under the intestate laws or by *inter vivos* transfers in contemplation of death or intended to take effect in possession or enjoyment at or after death. It also applies to the decedent's proportionate share of any property in which he had an interest as joint tenant at the time of his death and to any property over which "the decedent retained any dominion during his lifetime". Notwithstanding this latter provision, the Attorney General has ruled, largely because the tax is an inheritance and not an estate tax, that no tax is payable upon the death of a life tenant who by the terms of the decedent's will had the right to withdraw the entire corpus during his lifetime as well as a complete power of testamentary appointment.<sup>45</sup>

There were numerous other changes in the twenty-five times that the Legislature has amended the law, but it is not necessary at this time to consider them. Instead, let us turn now to the tax on commissions of executors and administrators.

As above noted, this tax was first imposed in 1844<sup>46</sup> and was  $\frac{1}{10}$ th of the commissions allowed. The statute provided that in fixing commissions the Orphans' Courts should make no allowance for the payment of the tax, "it being the intention of this act that said tax shall be borne by and paid out of such commissions, and not by the estates of the deceased".<sup>47</sup> Questions arose as to whether the executor was bound to pay the tax where he claimed no commissions but the Legislature removed these doubts in 1847 and provided that it should be the duty of the Orphans' Courts to fix commissions in every case and to reckon in the commissions any legacy left to an executor by way of compensation.<sup>48</sup> In 1860, this provision was repealed and it was provided that where the executor renounced commissions or elected to take less than full commissions he should be charged with the tax only on the commissions which he elected to take.<sup>49</sup> This provision, however, was short lived and was repealed in 1862 and the statute again provided that commissions should be fixed and the tax paid in all cases whether or not commissions were claimed.<sup>50</sup>

<sup>45</sup> 38 Ops. Atty. Gen. 301 (1953); *cf.* Connor v. O'Hara, 188 Md. 527, 53 A.2d 33 (1947).

<sup>46</sup> Md. Laws 1844, Ch. 184.

<sup>47</sup> *Ibid.*, Sec. 5.

<sup>48</sup> Md. Laws 1847, Ch. 230.

<sup>49</sup> Md. Laws 1860, Ch. 163.

<sup>50</sup> Md. Laws 1862, Ch. 18.

The rate of tax was reduced from  $\frac{1}{10}$ th to  $\frac{1}{20}$ th in 1864,<sup>51</sup> and increased from  $\frac{1}{20}$ th to  $\frac{1}{10}$ th in 1865,<sup>52</sup> but there were no other changes until 1916. In that year the statute was amended to fix the tax at 1% of the first \$20,000 of the estate, and  $\frac{1}{5}$ th of 1% of the balance of the estate, and to provide that it was due and payable whether or not the executor waived commissions and that no commissions less than the tax should be allowed by the Orphans' Court.<sup>53</sup> In 1935, another section was added imposing a tax on the commissions of an administrator *ad colligendum* of  $\frac{3}{10}$ ths of 1% on the first \$20,000 of the estate, and  $\frac{1}{15}$ th of 1% on the balance of the estate, the amount of this tax to be credited against the tax on commissions thereafter paid by the executor.<sup>54</sup>

The tax on commissions is included in this discussion of death taxes because although originally it was provided that the tax was not to be paid by the estate of the decedent, nevertheless, it seems that it has been essentially an estate tax almost since the beginning when the Legislature provided that the tax was payable irrespective of whether or not the executor claimed commissions. At all events, it would seem that at least since 1916 when the tax was stated as a percentage of the estate rather than a percentage of the commissions it has had all the elements of an estate tax. This statement is made with all due deference to the Court of Appeals which held in 1933 that, notwithstanding the Act of 1916 and the recodification act of 1929<sup>55</sup> which omitted the provision that it was intended that the tax be paid out of commissions and not by the estate of the deceased, nevertheless, the tax on commissions was not an "estate, inheritance, legacy, or succession tax" within the meaning of the Federal estate tax laws and the Maryland Estate Tax Law.<sup>56</sup>

The tax on commissions is, moreover, imposed upon the estate of every decedent regardless of its size, and under the decision of the Court of Appeals<sup>57</sup> no credit is allowable against the Federal estate tax for any part thereof. It must also be remembered that the tax is on the gross rather than on the net estate, or more correctly it is on the gross personal estate because the tax is not imposed with respect

<sup>51</sup> Md. Laws 1864, Ch. 372.

<sup>52</sup> Md. Laws 1865, Ch. 127.

<sup>53</sup> Md. Laws 1916, Ch. 559.

<sup>54</sup> Md. Laws 1935, Ch. 289.

<sup>55</sup> Md. Laws 1929, Ch. 226, Sec. 101.

<sup>56</sup> *Cross v. Downes*, 164 Md. 216, 217, 164 A. 758 (1933).

<sup>57</sup> *Ibid.*

to real estate unless the real estate is sold by the executor. It must be kept in mind too that the tax is imposed only with respect to the gross personal estate administered upon in the Orphans' Courts. It therefore is not assessed with respect to the vast amount of property passing to surviving joint owners nor with respect to any property passing by *inter vivos* transfers, whether or not intended to take effect in possession or enjoyment at or after death.

Now just a word as to the Maryland Estate Tax which was first imposed in 1929.<sup>58</sup> The law has been amended only once since that time and then only in a very minor way.<sup>59</sup> The statute is elaborate but essentially it provides that an additional tax is imposed on the estate of decedents equal in amount to the difference between the total inheritance taxes payable to the State of Maryland and the maximum credit allowable against the Federal estate tax under the Revenue Act of 1926 for "estate, inheritance, legacy, or succession taxes". The Maryland estate tax is, therefore, not an additional tax at all since it is carved out of the Federal estate tax.

The law has, however, given rise to administrative difficulties, at least for executors. Part of this difficulty stems from the fact that the property subject to the Federal estate tax is not always subject to the Maryland inheritance tax as, for instance, life insurance. But most of the difficulty arises from the fact that it is impossible in many instances to determine the exact amount of inheritance tax payable until after the Maryland estate tax return must be filed.

The inheritance tax, with respect to personal property at least, is payable on distributive shares as ascertained by the administrative account, but a prudent executor in making distribution of a substantial estate will almost always seek permission from the Orphans' Court to retain a part of the estate for future distribution after the audit of the Federal estate tax return has been completed. This usually takes several years, but in the meantime the executor will have paid the amount of the Maryland estate tax which will be the difference between the maximum credit against the Federal estate tax and the total amount of inheritance taxes theretofore paid. This means that when the amount of the estate retained pending audit of the Federal estate tax return is finally distributed an additional inheritance tax will be payable on this distribution but the executor will not be able to credit this against the amount of the

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<sup>58</sup> Md. Laws 1929, Ch. 275.

<sup>59</sup> Md. Laws 1933, Ch. 250.

Federal estate tax. Judge Henderson when Deputy Attorney General very sensibly ruled<sup>60</sup> that an inheritance tax need not be paid to the extent it had already been paid in the form of estate tax, but a later Attorney General reversed this opinion and notified all Registers to collect the additional inheritance tax in such cases.<sup>61</sup> No doubt the executor can claim a refund of the excess estate tax but this seems a wholly unnecessary burden to impose upon executors and it loses sight of the fact that because of the delay in auditing the Federal estate tax return or for other reasons the executor may be barred by limitations from obtaining a refund of the excess Maryland estate tax.<sup>62</sup>

The problems arising from our dual system of an inheritance tax and an excess estate tax are further complicated by the marital deduction provision of the Federal law, first enacted in 1948. I believe it was Mr. Justice Holmes who once said that the tax laws should not be so construed as to require the use of algebraic formulae to ascertain the amount of the tax. We have moved far since then because it is now necessary in many cases to use algebraic equations to ascertain the amount of the Federal tax in cases where there are charitable gifts other than specific legacies and even more complicated formulae are required where there is a marital deduction trust plus a further trust giving a taxable life estate to a widow with remainder to charity and the usual provision that the marital deduction trust shall be free of taxes. In such cases the ascertainment of what part of the total Maryland death taxes are inheritance taxes and what part is estate tax becomes almost an impossibility.

The administration of the Maryland inheritance tax is today essentially the same as it has been ever since the law was first enacted, that is, the tax is paid to the Register of Wills and he is the only State official who has any real

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<sup>60</sup> 24 Ops. Atty. Gen. 943 (1938).

<sup>61</sup> 39 Ops. Atty. Gen. 284 (1954).

<sup>62</sup> Essentially it makes no difference to the State whether the tax is paid in the form of inheritance taxes or as Maryland estate taxes, but it does make a difference to the Registers of Wills in the State because under the law they are entitled to a commission on the inheritance taxes collected by them but they receive no commission on the Maryland estate tax which is paid directly to the State Comptroller. In the larger counties and in Baltimore City this is not a matter of any moment, but it is to the Registers in the smaller counties because although they are not permitted to keep the fees of their offices they are dependent as a practical matter upon the fees and commissions allowed them by law to pay the expenses of their offices. They evidently feel that if their fees and commissions are reduced the Comptroller will drastically reduce their allowance for operating expenses.

supervision over it. Judge McSherry may have been speaking accurately in 1889 when he said:

"No estate can escape administration if the law be enforced, and when the property passes into the hands of the executor or administrator his obligation to pay the tax is fixed and his bond at once becomes liable therefor."<sup>63</sup>

But this is not true now because today a great deal of property passes at death which does not appear in the administration account. For instance, the statute imposes a tax on transfers in contemplation of death. The Attorney General has ruled consistently that the duty of ascertaining whether a transfer is in contemplation of death rests with the Registers of Wills,<sup>64</sup> but except for the information report which executors have been required to file since 1941<sup>65</sup> the Register really has no means of ascertaining what property may be passing subject to the tax.

This is especially true with respect to the tax on jointly owned property. A careful conveyancer will reject a title when he notices a joint ownership, a subsequent death and no inheritance tax paid. But this happens in comparatively few cases and only when the transfer is made within four years after the death of the joint owner. Consider the situation with respect to joint bank accounts, perhaps the simplest and most common form of joint ownership of property today. In Baltimore City and in a few of the larger counties the banks and the larger Federal building associations report to the Registers instances where they have reason to believe that a joint owner of a bank account has died. But this is not compulsory and is not the universal practice. In 1951, the Case Tax Revision Commission recommended the adoption of a statute which would impose on savings banks and similar institutions the obligation to require a person making a withdrawal from a joint account to certify in writing that all other parties named in the account were alive. A bill including this provision was introduced in the Legislature<sup>66</sup> but the provision was deleted in Committee because it was felt that it imposed too great a burden on the banks. Consequently a great many joint savings accounts are not taxed upon the

<sup>63</sup> *State v. Dalrymple*, 70 Md. 294, 301, 17 A. 82 (1889).

<sup>64</sup> 22 Ops. Atty. Gen. 804 (1937); 24 Ops. Atty. Gen. 849 (1939); 27 Ops. Atty. Gen. 378 (1942).

<sup>65</sup> Md. Laws 1941, Ch. 790.

<sup>66</sup> Md. Laws 1951, Ch. 620 (Sec. 112 — stricken out), p. 1851.

death of one of the joint owners. The same is undoubtedly true as to securities and other joint property.

Since there is no centralized administration of the laws with respect to inheritance taxes and the tax on commissions, there are, of course, no regulations supplementing or interpreting the law and the only official rulings, aside from court decisions, are the opinions of the Attorney General. Practically all of these opinions are given to the Registers of Wills but in a few instances there are opinions to court clerks, the State Auditor, the Comptroller and very occasionally to a trust company or a lawyer. Unfortunately, there is no system by which these opinions are made available to all Registers and surprising as it may seem, all Registers do not receive the *Daily Record*. In addition, only a few of the Registers who do receive the *Daily Record* maintain a continuing file of the opinions of the Attorney General with respect to these taxes.

A few statistics with respect to the number of opinions of the Attorney General on death taxes might be interesting. In the ten year period from 1935 to 1944, inclusive, which was the period immediately following the imposition of the lineal inheritance tax and the increase in the collateral inheritance tax rate, there were 396 opinions on inheritance taxes and 28 opinions on the tax on commissions. This was an average of about 40 per year on inheritance tax, there being a high of 65 in 1939 and a low of 18 in 1943. With respect to the tax on commissions, out of the total of 28 opinions in the ten year period 11 were rendered in the year 1935 so that the yearly average is somewhat meaningless.

As might be expected the Register of Wills of Baltimore City heads the list of those requesting opinions on inheritance taxes. There were 122 such in the ten year period. Next follows Frederick County with 45, Prince George's County with 26, Baltimore County with 24 and Anne Arundel County with 22. Only the Register of Wills of Calvert County requested no opinions at all during this ten year period, although there were quite a few counties requesting only 3 or 4 opinions in the ten year period.

In the ten year period from 1945 to 1954, inclusive, (the last year for which the printed volume of the opinions of the Attorney General is available) there were 155 opinions on inheritance taxes and during the same period only 11 opinions with respect to the tax on commissions; of these 11 opinions, five were in the year 1945 and three were requested by the Register of Wills of Baltimore City. Of the

total of 155 opinions on inheritance taxes in this ten year period, 46 were requested by the Register of Wills of Baltimore City. Next was Frederick County again with 17, then Montgomery and Talbot Counties with 12 each and then Prince George's County with 9. There were a number of instances in which a Register had requested only one opinion in the ten year period and the Registers for St. Mary's and Washington Counties joined with the Register for Calvert County in not requesting any opinions. This means that in the past 20 years the Registers of Wills for Calvert County has not felt the need for any legal assistance whatsoever in administering the inheritance tax laws for his county.

In 1941, one of the principal recommendations of the Rawls Tax Revision Commission, of which Judge Henderson was a leading member, was for the creation of a State Department of Revenue which among other things would have the duty of administering the inheritance and estate tax laws. The Commission recommended a rather simple method of administration which would have accomplished three important objectives: (1) it would have made uniform the administration of the inheritance tax laws in all the counties, (2) it would have resulted in the collection of a very much larger amount of inheritance taxes, and (3) it would have made possible the compilation of statistics which would in turn have made a realistic, sensible and intelligent revision of the inheritance tax laws entirely feasible. The Legislature rejected this proposal. The Case Commission in 1951 again urged these same recommendations on the Legislature but they were again rejected.

The author has been convinced for many years that the inheritance tax produces far less revenue than it would if it were fully and fairly enforced. I do not mean to say that I am in favor of more taxes simply to produce more revenue, but the vicious thing about the failure to collect the full amount of inheritance taxes, as it is with the failure to enforce any other tax law, is that it penalizes the honest citizen, and what is worse, puts a premium on man's natural cupidity and desire to avoid the payment of taxes. It is unfair, I think, for property to be subject to a State tax in Baltimore City or in some other county where the Register is alert and have the same property escape payment of the same tax under the same circumstances in another county.

I have for a long time thought that a simple estate tax law in Maryland would produce as much and perhaps more



revenue and would operate much more fairly than the present inheritance and estate tax laws and the present law imposing a tax on commissions of executors. Tax Revision Commissions have heretofore shied away from any such fundamental changes feeling that sufficient statistical information was not available to enable them to proceed intelligently. I agree that statistical information would be most helpful but it seems to me that changes could be made without complete statistical information being available.

By writing to the Register of Wills in Baltimore City and in each of the counties I have been able to gather some information which although woefully incomplete and pertaining only to the year 1955 is, nevertheless, somewhat useful. There were approximately 4,000 estates on which administration was granted in 1955. Of this number 2,218 were administered in Baltimore City. Next in number was Baltimore County with 584, then Montgomery County with 453, Prince George's County with 325, Frederick County with 251 and Washington County with 244. All remaining counties were less than 200.

The size of the average estate varied considerably and, of course, the figures on this are necessarily inaccurate because they are not statistical but are merely the best estimate of the Register of Wills. In Baltimore City, Mr. Shaughnessy tells me that he thinks the average estate is about \$13,000 and in about three-fourths of the administrations there is at least some real estate. In Baltimore County on the other hand, Mr. Connor thinks the average estate is about \$25,000, and he tells me that of the 584 estates in 1955 there was a real inventory in 242 of them. In Frederick County, Mr. Radcliff also thinks the average estate is about \$25,000 divided equally between real and personal property, although he points out that in the 251 administrations in 1955 there was a real inventory in 203. Most of the other Registers think the average estate is from \$5,000 to \$10,000 of which from 30% to 70% is real estate.

The largest estate administered in 1955 was in Baltimore City, the amount being \$7,000,000. The next largest was in Wicomico County with \$1,750,000, then Baltimore County with \$1,120,000, Washington County with \$919,000, Frederick County with \$800,000, and Worcester County with \$514,000. In all other counties the largest estate administered in 1955 was \$380,000 or less. It is interesting to note that with two exceptions by far the greater part of each of these largest estates was personal property and the \$7,000,000 estate in Baltimore City was entirely per-

sonal property. In Worcester County \$408,000 out of \$514,000 was real estate and in Prince George's County \$127,000 out of \$163,000 was real estate. In all other instances with respect to the largest estate in 1955 the real estate was 10% or less of the total.

In 1953, 1954 and 1955, the values of personal property and particularly of stocks and bonds soared, nevertheless, in Baltimore City there were only about 65 petitions for reappraisal in 1955 and in none of these did the executor seek a reappraisal to show an increase in the value of the assets. In Baltimore County there were 10 petitions for reappraisal but only 7 in all other counties combined. This would seem to indicate rather conclusively, if it were not already self-evident, that the tax is not being collected on the increase in the value of an estate during administration.

I was very much interested in the answers of the Registers as to the number of instances in which there was no administration but in which a trustee or other fiduciary filed a petition or inventory to determine the amount of inheritance tax due. There were 144 such instances in the entire State in 1955, but curiously enough, of these 35 were in Prince George's County and 32 in Frederick County as against 30 in Baltimore City. On the basis of the gross receipts taxes paid by safe deposit and trust companies I believe that about 75% of the trust business handled by trust companies is in Baltimore City, and I therefore expected to find by far the greater percentage of these petitions filed in Baltimore City and Baltimore County.

I was also somewhat surprised at the information given to me as to the number of transfers in contemplation of death taxed by the respective Registers. I had expected to find that there were practically none such. Instead there were 70 such instances in 1955, of which 25 were in Baltimore City, 9 in Frederick County, 7 in Montgomery County, and 5 each in Baltimore and Prince George's Counties; all other counties reported 3 or less such instances. I understand, however, that the amounts involved in these transfers were in practically all instances comparatively small, most being in the neighborhood of \$5,000 or \$10,000 and involving bank accounts.

I was unable to get any accurate information to indicate the extent to which the Registers have been successful in collecting the tax on joint bank accounts. I am inclined to think that in Baltimore City, Mr. Shaughnessy has been fairly successful, although I am quite sure that the tax is by no means paid in every case where it is due. I am

equally convinced, however, from the letters I have received that in the counties this is not at all the case.

It would be foolish for me to suggest on the basis of this very scanty information that one could evolve a substitute plan for the taxation of inheritances in Maryland and be reasonably certain as to the amount of revenue which would be produced. It does not, however, seem to me that the amount of revenue involved is such a tremendous part of the State budget that it would be unreasonable for the Legislature to gamble a bit for a year or two if by so doing a simple, more practicable, and fairer system of death duties could be tried out.

I personally would favor a simple estate tax rather than the present combination of four taxes. I think a reasonable exemption of perhaps \$25,000 could be allowed. The amount of revenue derived from estates of less than that amount cannot be very great and the cost of collecting the tax is certainly disproportionately high. In addition it seems to be only fair to relieve small estates entirely of the burden of the tax.

On the other hand, I see no valid reason today to tax inheritances to children at a very much lower rate than inheritances to brothers and sisters or their children, particularly if there is a total exemption of the small estates. On the other hand, transfers to surviving spouses, or at least to widows, would appear to be in a somewhat different category, and I personally would exempt entirely from tax all property passing to or for the benefit of a surviving spouse. In any event the State law could at least go as far as the Federal law and exempt from the tax property passing to a surviving spouse to the extent of one-half of the gross estate. This would certainly be more logical than to base the exemption upon the form of the title, that is, whether the property was held in the individual name of the deceased spouse or in the joint names of both spouses.

The present Maryland estate tax should be retained as an additional tax in order to pick up the differences between the amount of the tax under the new law and the maximum credit under the Federal law but I think the tax on commissions should be repealed. The fact that the repeal of this tax would result in a slight increase in the amount of the maximum commissions allowable to an executor would not give me any great concern. The inheritance tax on income should also be abolished but this would not result in any loss of revenue because the income would then be subject to income tax. As to valuation, I

would require the executor to value either as of the date of death or as of one year thereafter, whichever was used for Federal estate tax purposes.

If these suggestions were followed and a tax imposed on the net estate, I should think a reasonable rate to be paid by the estate would be 4% to 5%, depending somewhat, of course, upon the amount of the exemption.

The Comptroller's report for the fiscal year ended June 30, 1956, indicates that the total collections from the present four death taxes were as follows:

Collateral inheritance tax.....	\$2,169,011
Direct inheritance tax.....	800,923
Maryland estate tax.....	851,572
Tax on commissions.....	395,335

This would indicate that the amount of property subject to the collateral inheritance tax was \$28,920,146, and the amount subject to the lineal inheritance tax was \$80,092,300, or a total of \$109,012,446; 4% of this would produce \$4,360,497 or a little more than the total produced by the present four death taxes. Of course, this does not take into consideration the amount which would be lost by the complete exemption of estates of less than \$25,000, and it would be difficult if not impossible to make any accurate estimate of this. On the other hand, there would still be some additional estate tax to pick up the credit under the Federal estate tax law on estates in excess of \$700,000. How much would be picked up in this way is again difficult to estimate but it is likely that a substantial part of the \$851,572 now derived from this source is paid by estates in excess of \$700,000. At all events it is probable that the total revenue derived from a 4% Maryland estate tax and an excess estate tax would be substantially more than the total revenue derived from the present taxes. If experience proved otherwise it might be necessary to increase the rate to 5%.

There would necessarily be some problems to be worked out in drafting such a statute for Maryland in order to avoid the complexities of the Federal statute, but I do not believe these problems are insurmountable. Undoubtedly also the administration of an estate tax would be much more efficient if it were centralized in a department of revenue, but this again would not be absolutely essential. It would be possible to have the estate tax returns filed with the Registers of Wills so long as one central authority prescribed the form of the return.

The basic difficulties with the present system of death duties in Maryland are the inordinate expense of administering the law, the loose administration of the law and the inequalities of the burden of the tax. I believe these difficulties could be removed by the repeal of the present laws and the enactment of an estate tax law, and it seems to me that rather than try any more to patch up the present law or adapt it to present day conditions a new approach is worthwhile. It is my firm belief that a moderate estate tax law reasonably well administered would produce for the State of Maryland a much greater revenue with much less inequality than do the present laws.